IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 211-212

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR,
PETITIONER,

VS.

CENTRAL HANOVER BANK AND TRUST COMPANY, et al.,
RESPONDENTS.

MEMORANDUM IN REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT

Respondents argue that failure to apply for certiorari in No. 13470 forecloses consideration of any errors in the Order of Consummation, No. 13521 in the Circuit Court of Appeals, or any Final Decree.

The District Court Order refusing to remand (No. 13470 C.C.A.) was an interlocutory order. The Circuit Court of Appeals was fully advised that a Final Decree had been entered, therefore an appeal from Final Decree would bring up any error in the interlocutory order, and, if no appeal was taken from the Final Decree, any errors in the interlocutory order would be immaterial. Therefore,

the appeal from the interlocutory order in No. 13470 was dismissed, but the motion *to affirm* was not granted. This left the question involved, at large, for consideration on appeal from Final Decree.

The nonchalant assumption that the request for remand in the Denver and Rio Grande was the model for the request in this case is simply untrue. The great and multifarious changes in conditions affecting the status of Class One Railroads in the National economy has been common to all Roads now enmeshed in §77 proceedings. The impact of those conditions on each Road is a subject for separate consideration. Furthermore, the right to have the court perform its part by a judicial determination of the amount due each creditor was emphasized in this case and not touched upon in the Denver and Rio Grande case.

The Debtor is convinced that a grave injustice has been done to it. It has been advised by this Court's language in the Denver and Rio Grande case (in 328 U. S.) that the effect of changed conditions after the date of Commission certification of Plans has not been determined. It has been unable to find a time and place in the processes of §77 where that question can be determined with a full, free and unprejudiced hearing.

(a) It objected to the Plan as certified and was told emphatically that the power to determine all pertinent "value" factors, including the major factor of future earning power, rests with the Commission, and that the Court cannot determine it.

(b) No Final Decree having been entered, and major changes in conditions affecting future earning power having developed, it applied to the District Court for appropriate recognition of this new status. The District Court has no competency under the Act to determine the effect of changes in conditions; that is something for the Commission to determine. The Court, in substance, says it cannot determine that effect because the Commission has "visualized" it. So, the question remains undetermined.

(c) No application can be made to the Commission as of right because the Commission takes the position that it cannot reform the Plan unless the court sends the Plan back. Or it takes the position, even if it has the Plan before it for some modification, that the Court, by approving the Plan, has foreclosed further consideration of this basic problem.

On the basis of this reasoning, every door to a full, free and unprejudiced consideration of the effect of the notorious changed conditions is hermetically sealed.

The validity of Debtor's contentions is such that the sheer weight of its inherent justice has resulted—

A. In the dismissal of the reorganization proceedings in the Cotton Belt case (St. Louis-Southwestern) even after the approval of the Reorganization Plan on appeal, and denial of certiorari by this Court; and

B. In the Missouri Pacific reorganization in which the approved Plan was disapproved by the Circuit Court of Appeals.

In these two cases in the Eighth Circuit steps were taken which the Circuit Court of Appeals should have taken in the case of your petitioner, the Frisco.

In neither case, however, did the courts do it in the way it should have been done in order to preserve the dictates of due process. The fact that conditions have radically changed should have been recognized and the Plans should have been formally sent to the Commission for a due process hearing.

Instead, the Commission was invited to advise the courts whether it would consider changed conditions, and, without hearing, the Commission concluded that such changed conditions should be considered.

The return of the Plans should be based on the courts' knowledge that there are changed conditions, and the pro-

cedure should be to return the Plan to the Commission for it to give consideration to those changed conditions in the way that due process requires.

Since the two Plans referred to were sent back to the Commission they can be handled in accordance with due process, and one of them has already been so handled by the dismissal of the reorganization proceedings.

The condition precedent of Commission advice calls for the obtaining of Commission action by wholly unorthodox means, and, if the ultimate result is to depend on such steps, the aboveboard method is to recognize frankly that changes have occurred which require reconsideration by the Commission, that it is not the province of the Court to determine what answer shall be given to that great change of status.

Respectfully,

WILLIAM V. HODGES,
947 Equitable Bldg.,
Denver 2, Colorado,

DANIEL BARTLETT,
506 Olive Street,
St. Louis 1, Missouri,

Attorneys for St. Louis-San Francisco Railway Company, Debtor.

Dated: September 25, 1947.